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IN THE
Supreme Court of the United States

October Term, 1952

No. 290.

ERNEST A. WATSON and M. GLADYS WATSON,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REHEARING.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Ernest A. Watson and M. Gladys Watson, petitioners in this cause, respectfully petition the Court for rehearing, and present the following grounds in support of this petition:

I.

The Basis of the Decision Is in Conflict With Previous Decisions of This Court.

The decision of the majority of the Court places its chief reliance on a legislative enactment made in 1951 as an interpretation of a statutory phrase dating back to at least 1924 (Revenue Act of 1924, Sec. 208(a)(8)). Amendments designed to further restrict the application of that phraseology (as it appears in Sec. 117(a)(1)); were made by the Revenue Act of 1934, and further

amendments occurred in the Revenue Act of 1938, c. 289, 52 Stat. 447, and the Revenue Act of 1942, c. 619, 56 Stat. 798.

The amendment of 1938 excluded from capital assets treatment, property such as buildings, the trees in an orchard or orange grove and similar real property improvements, all depreciable property used in a business. This was reversed by the 1942 Act. But this four-year hiatus in the treatment of perennial plantings would in no wise affect the question of whether growing annual crops sold with the real property should be given, along with the real property, capital gains treatment. Thus, except for a four-year hiatus with respect to one type of growing crops (those on perennial plantings) the Treasury Department was in a position to raise the question of the taxable status of growing crops over a period of at least 22 years, until 1946 when it made its pronouncement in I. T. 3815 (1946-2 Cum. Bull. 31). The comparison of the wave of litigation following that pronouncement with the absolute lack of any litigated cases prior to 1946 on the subject conclusively demonstrates that the position of the Bureau in 1946 was a complete reversal of the position that it had held in interpreting the statute for 22 years.

It was only subsequent to that change in the Bureau's position, and the extensive litigation which it engendered, that the Congress passed in the Revenue Act of 1951 (sec. 323), its approval of the inclusion of growing crops sold along with the realty for capital gains treatment under Section 117(j) of the Internal Revenue Code.

We thus have a situation where a congressional act of 1924, was given a contemporaneous interpretation by its administrators which was followed for 22 years. This

Court in *Fogarty v. United States*, 340 U. S. 8, 13-14, 95 L. Ed. 10, 15, declined to supplant the contemporaneous intent of an earlier Congress with an intent implied from later congressional activity with regard to the same subject matter. We respectfully submit that a contrary result was reached by a majority in this case.

The fact that an assumed history and purpose of the 1951 amendment should not be decisive of the result in this case is demonstrated by the fact that the majority and minority opinions are exactly opposed in their interpretation of the congressional intent in enacting it. Furthermore, the courts of appeals in the Tenth Circuit (*McCoy v. Commissioner*, 192 F. 2d 486, 488-489), and in the Ninth Circuit (*Watson v. Commissioner*, 197 F. 2d 56, 58), were also directly opposed concerning that intention. The Fifth Circuit in *Owen v. Commissioner*, 192 F. 2d 1006, 1009, apparently saw no clear congressional intention in the 1951 amendment, one way or another. Thus of the 18 appellate justices and judges who have heard and decided these cases, 9 said that Congress in 1951, intended to change the law, 6 said it did not, and 3 said Congress did not express itself one way or another.

Mr. Justice Jackson concurring in *United States v. Public Utilities Commission*, October Term, 1952, No. 205, Decision April 6, 1953; 97 L. Ed. (N. S.) 637, 649, referred to his preference for a process of decision by "analysis of the statute instead of by psychoanalysis of Congress." The majority in the instant decision has, we respectfully submit, utilized the latter process; and it has not only determined inferentially what was in the mind of the 1951 Congress, but has imposed that legislative intention on the many Congresses which dealt with the statutory wording in question back to the passage of the 1924 Act.

II.

**Contrary Decisions of This Court Concerning
Administrative Interpretation.**

We have referred above to the fact that the 1946 interpretation of the Bureau of Internal Revenue (I. T. 3815, 1946-2 Cum. Bull. pp. 30-31), represented a change in position. As we have stated, litigation of this question came subsequent to the issuance of that ruling by the Income Tax Unit of the Bureau. It is important to realize that all of these questions concerning the allocation of a portion of a lump-sum purchase price to growing crops contain the problem of *valuation* as well as the problem of allocation. Even if taxpayers had all acquiesced in the proposition contended for by the Bureau in its 1946 ruling prior to the date of that ruling, it is apparent that at least the question of the valuation of some of the growing crops involved would have been brought before the courts. Yet there is not a single case involving tax years other than those open for examination at the time of the 1946 promulgation, which raises either the question of allocation or valuation of growing crops included in a lump-sum sale.

There was thus an administrative interpretation consonant with the taxpayers' position, and contemporaneous with the statutory enactment here being interpreted over a long period of years.

Such an administrative interpretation is entitled to substantial weight (*Lykes v. United States*, 343 U. S. 118, 126-127, 96 L. Ed. 791, 800, and cases cited; *Universal Battery Co. v. United States*, 281 U. S. 580, 583, 47 L. Ed. 1051, 1055), and such administrative construction may be implied from inaction as well as from positive

assertion (*Federal Trade Commission v. Bunte Brothers, Inc.*, 312 U. S. 349, 351, 352, 85 L. Ed. 881, 884; *United States v. American Union Transport*, 327 U. S. 437, 459, 90 L. Ed. 772, 784, dissenting opinion of Mr. Justice Frankfurter). A situation much similar to the instant one was present before the Court in *White v. Winchester Country Club*, 315 U. S. 32, 41, 86 L. Ed. 619, 626, except that the Treasury Department's original interpretation was in favor of the tax sought to be collected, and by the time of the events under consideration it had reverted to that position.¹ This Court held that the views expressed by the Treasury Department shortly after the terms defined were first included in the Revenue Act were, as

“substantially contemporaneous expression of opinion . . . highly relevant and material evidence of the probable general understanding of the times and of the opinions of men who probably were active in the drafting of the statute. As such they are entitled to serious consideration, independently alike of re-enactments of the statute while it was in force on the books and of any temporary abandonment in consequence of disregard by judicial decision.”

¹There was also in this case a later definitive statute enacted subsequent to the transactions under consideration. With regard to this the Court said: “The legislative history of this redefinition is inconclusive in respect of the earlier intention of Congress. The action of Congress in thus explicitly defining the existing statutory term is at least as consistent with dissatisfaction on its part with the course of judicial decision as to its meaning as with the existence of an intention to change the law.” 315 U. S. at p. 39, 86 L. Ed. at p. 626.

III.

The Basis of the Decision Ignores the Long-settled Principle That Taxation Is Based Only on the Realization of Income.

The majority would tax as a crop realization the expectancy or potentiality of a future or expected crop. It has repeatedly been held that tax laws deal with actualities and are unconcerned with theoretical considerations. As indicated in the case of *Louise Owen v. Commissioner*, 192 F. 2d 106 (C. C. A. 5th), it is stated "as in other problems of taxation, the approach should be factual, not hypothetical." While it has been customary, in the citrus industry, to refer to an unharvested crop, it is actually a misnomer. The word "crop" connotes harvested fruit, or fruit that has been severed or "cropped" from the trees. When a grower refers to a so-called growing crop, he is doing so in anticipation of something that he expects he will have, according to the laws of nature, at a future time.

A "crop" of oranges cannot be "held for sale to customers * * *" until that crop of oranges comes into existence. The Court says, on page 6 of the decision:

"Each day brought the annual crop closer to its availability for sale in the ordinary course of that business. * * *"

But, if the crop did not in fact exist until the trees had produced it, it is plain that there was no crop being held for sale to customers or for any other purpose. We are speaking, here, of the trees and their fruit, but there is a parallel in the case of animate things. A sheep herder might anticipate a "crop" of lambs at the time he sells his flock of sheep, but certainly, he can not be said to be selling lambs which had not yet been born or produced.

Granted that each day brought the so-called crop closer to its availability for sale, it cannot be said the crop is available for sale in the ordinary course of the grower's business until it is harvested. It follows that fruit must be available and exist before it can be held for any purpose.

Conclusion.

We respectfully suggest that the primary basis for the decision of the majority of this Court is contrary to precepts of statutory construction previously applied in decisions of this Court. The majority opinion is also contrary to the prior decisions of this Court holding that tax laws deal with actualities and are not concerned with theoretical considerations.

We respectfully urge the Court to reconsider its decision, and pray the Court to order a rehearing so that the fullest possible consideration can be given to the consistent application of rules of statutory construction of revenue legislation. We respectfully pray the Court, on rehearing, to reverse the Court of Appeal and find for the petitioners.

Dated May 29, 1953.

Respectfully submitted,

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RICHARD N. MACKAY,

CHARLES J. HIGSON,

Of Counsel.

Certificate.

I, Arthur McGregor, of counsel for Ernest A. Watson and M. Gladys Watson, petitioners herein, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

ARTHUR MCGREGOR,

Attorney for Petitioners.

Service of the within and receipt of a copy thereof is hereby admitted this.....day of May, A. D. 1953.
